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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. [redacted]142

JAY LEE GIBSON, *Petitioner*,

v.

[redacted]Y A. THOMPSON, TRUSTEE, NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY, *Respondent*

REPLY TO PETITION FOR WRIT OF CERTIORARI

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SUBJECT INDEX

	PAGE
STATEMENT OF MATERIAL FACTS	2
REPLY TO PETITIONER'S REASONS FOR GRANTING THE WRIT	10
CONCLUSION	21

LIST OF AUTHORITIES

CASES

Camp v. J. H. Kirkpatrick Co., 250 S.W. 2d 413 (Wr. Ref., N.R.E. 1950)	21
Delaware, L. & W. Ry. Co. v. Koske, 279 U.S. 7, 73 L. Ed. 578, 73 L. Ed. 581	16, 17, 19
Frizzell v. Wabash R. Co., 9 Cir., 199 F. 2d 153	14
G.C. & S.F. Ry. Co. v. Rediker (Sup. Ct. 1886), 2 S.W. 513	19
Hopson v. Gulf Oil Corp., 237 S.W. 2d 352, 150 Tex. 1	12
Louisville and N. R. Co. v. Davis (Ct. App., 6 Cir. 1935), 75 F. 2d 849, 850	16
Texas & New Orleans Railroad Co. v. Hayes, 293 S.W. 2d 484	12
Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 87 L. Ed. 610, 63 S. Ct. 444, 451	11
Webb v. Illinois Central R. Co., 77 S. Ct. 451, 1 L. Ed. 503	11, 12

IN THE

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OCTOBER TERM, 1956

No. 1034

JAY LEE GIBSON, *Petitioner*,

v.

GUY A. THOMPSON, TRUSTEE, NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY, *Respondent*

REPLY TO PETITION FOR WRIT OF CERTIORARI

Respondent cannot agree with Petitioner's Statement of Questions presented. The Questions involved herein are as follows:

(1) Is there any evidence in the record to support the finding of the jury that Respondent was negligent, and if negligent, was such a proximate cause of Petitioner's injuries, in

(A) Requiring Petitioner to walk from the Roundhouse to his engine;

(B) Failing to firmly pack the Gravel about and between the tracks; and

(C) Failing to provide a smooth walkway or path from the Roundhouse across the yards to Petitioner's engine.

Another alleged act of negligence (failure of Respondent to use gravel of a uniform size) was submitted to the jury and found by the jury in favor of Petitioner. However, on appeal by Respondent to the Court of Civil Appeals, that Court held that the finding of the jury that Respondent was negligent in failing to use gravel of a uniform size was not supported by the evidence. (See page 26 of the Petition for Writ of Certiorari). Petitioner made no objection to that holding and did not file either a motion for rehearing or an application for Writ of Error. Therefore, Petitioner has not preserved any point of error with respect to that ruling by the Court of Civil Appeals. See *Shambray, et al. v. Housing Authority of City of Dallas* (Supreme Court, 1953), 255 S.W. 2d 184. As no point was preserved, there is not before this court any point involving the size of the gravel used by Respondent in the yard.

Statement of Material Facts

Petitioner - a locomotive engineer in the employ of Respondent - had operated his train into and out of Settegast Freight Yard on an average of three times a week (S.F. 14) for the six months immediately preceding the accident in question (S.F. 13). Settegast Yard is a large freight yard divided into three sections - "A", "B", and "C". There are numerous tracks in the yard and they run

in a north and south direction. (Plaintiff's Exhibit #2). Petitioner's locomotive was spotted in "C" yard, about 900 feet from the roundhouse. (S.F. p. 22). "A" and "B" yards were between the Roundhouse and "C" yard. (S.F. p. 22).

On the night in question, Petitioner first checked in at the yard office (S.F. p. 53). He then got someone to carry him in an automobile around close to the Roundhouse (S.F. p. 53). He then walked across the tracks to his engine without mishap (S.F. p. 53), with the aid of the automobile lights (S.F. p. 55). Once on the engine he made various tests in preparation for the trip. However, the conductor came to him and told him that he was wanted on the telephone (S.F. p. 55). Petitioner and the conductor then walked across the yard to the Roundhouse (S.F. p. 56). The conductor had his lantern (S.F. p. 56). After Petitioner had completed his business at the Roundhouse he started back to his engine (S.F. p. 56). It was in the course of this trip that he alleges he fell. Petitioner did not have any light to aid him on this last trip. He was in "B" yard when he fell (S.F. p. 58).

There were no witnesses to Petitioner's fall, save Petitioner himself. In order for this Honorable Court to have a clear conception of Petitioner's version of the fall, we quote, verbatim, his testimony regarding the fall. It is as follows:

> "As I was going back to the engine I was walking and zigzagging through the yard where the cars were standing, walking around where they were switching cars back and forth, kicking them down the *the* lead, to avoid those cars, and as I went back I was getting pretty close to the engine and I fell by stepping on a

round rock that slipped my foot under the web or base of the rail and it caught me because I was off balance, and I tried to pull against it, and that foot was in there tight, and this foot was in the center of the track to keep from falling, and the round gravel slid out from under me, causing me to twist as I fell. I had my gloves on and this hand went right down between the rails, with my head between the ties, and it flopped my head back to the center of my back,—it just popped, and as this knee went down I got a big gash on my knee. It was all bruised up and a gash cut in it." (S.F. p. 27)

On cross examination Respondent testified with respect to his falling as follows:

"Now, in walking back across there you had walked quite some distance before, as you explained it, you slipped on a rock?

A. Yes.

Q. Did there seem to be any difference in the feel of this rock you slipped on and any of the other rocks you had been walking over?

A. Well, yes—the only way I can explain it, Mr. Hoover, in terms of my language.

Q. Well, that is the way I want it.

A. Well, I couldn't explain it in a lawyer's language.

Q. I don't want you to.

A. All I can do is give you approximately in all of the railroad slang I know. When I slipped on that rock it shot my foot sort of quick, that was the difference in time, it was quicker, and I lost my balance by my foot going under the web of the rail, and I fought against it and I just went over.

Q. Which foot stepped on that particular rock?

A. The right foot." (S.F. pp. 58 and 59)

"Q. Had they held you pretty well in walking across the ground, had you slipped out there before?
A. The gravel did work under you, yes.
Q. It worked under your feet because it was loose?
A. Yes, sir.
Q. The difficulty, however, was when you stepped on this particular rock you slipped?
A. Well, it just shot me, just like a man would be if a calf was throwed.
Q. Did your right foot catch under the rail?
A. It went under the web of the rail. It caught my toe under the web, and it was caught by the gravel, and I couldn't get it out.
Q. Then your left foot come around?
A. Yes, I was in motion and it went in between the rails and hit, I imagine, on the tie with that little round gravel, and when it did that, that little round gravel let it go plumb out because this foot was hung and it had a pressure trying to get this one loose. It was sort of like roping a calf.
Q. You had one foot hung under the rail, and this foot went across and hit in between the rail?
A. Yes, sir.
Q. Then you fell forward?
A. Yes, sir." (S.F. pp. 60 and 61)

"Q. I believe you said you never saw the particular rock there before or after?
A. No.
Q. And the only way you can describe it is how it felt on the sole of your foot and the way it reacted when it scooted out from under you?
A. That is all I know." (S.F. pp. 67-68)

It will be noted from the foregoing excerpt that there is no contention made by Respondent that there was any depression or unevenness in the yard. The only cause of the fall was the rolling of rock upon which he stepped.

Several witnesses testified regarding the condition of the yards. We will summarize most of that testimony and only in a few instances will the witness be quoted verbatim. On this point, the Petitioner testified as follows, (narration ours):

> "The heavy gravel was awfully hard to walk on. Your feet would sink in it, it was rolling and hard to walk in. Any gravel is hard to walk in, whether there or in any place. (S.F. p. 20). When you are coming into the yards (off of a run) you can walk down the leads, which is easier than walking across the tracks. It is rougher walking across the tracks than down the tracks. (S.F. p. 51). Since this was a new yard the gravel was loose. I walked on it and all the other men walked on it." (S.F. p. 53).

> "Q. Have you seen any of the other boys fall?
> A. I wasn't looking for anybody to fall on it." (S.F. p. 53).

> "The condition in Settegast yards was different from other freight yards in that they did not have *that much* loose gravel in other yards." (S.F. p. 68).

One of petitioner's witnesses, Terry, testified that the ballast consisted of sand and rocks, but no big rocks. The largest was the size of a hen egg. (S.F. p. 96). Another of Petitioner's witnesses (O'Connell) testified that he walked over this area frequently and that a person could fall on the gravel *"if you are not careful."* He fell one night when he had on hard sole shoes and stepped on a rail.

Another of Petitioner's witnesses, Chandler, testified as follows (Narration ours):

> "Q. Would it [the gravel] support a man as he walked over it, or would he sink down?

A. Well, he would sink down as you walk.
Q. Was it easy or difficult to walk on that gravel?
A. *Quite difficult if you had any distance to go.*" (St. F. p. 150)

"This condition was not common to all the other railroad yards that I have seen. All the others have been older yards and they were gravel but *the gravel had packed more or less.* (St. F. p. 151)"

Another of Petitioner's witnesses, John B. Hill, testified as follows:

"Q. Can you tell me what they had covered the yards with?
A. Rocks.
Q. What kind of rocks were they?
A. Just big gravel.
Q. Was it a particular kind of gravel?
A. Yes, sir, just *regular railroad gravel.*" (St. F. p. 194)
"Q. How was walking out there?
A. You would walk your legs off. You got awful tired, you would take a step and slip." (St. F. p. 194)

C. R. Dubose was called as a witness by Respondent and testified as follows (Narration ours):

"My name is C. R. Dubose; I am employed by the New Orleans, Texas & Mexico Railway Company and have been since 1924 as a civil engineer. (S.F. p. 300). My work primarily involves track construction, industrial track yard design and terminal design, freight and passenger terminals. In 1948, '49 and '50 I was resident engineer on the construction of Settegast yards, here in Houston." (St.F. pp. 300-301)

"Please tell the jury something about the planning and construction of that yard.

A. Well, it was designed as a freight terminal under the A.R.E.A. specification and practice.
Q. What is the A.R.E.A.?
A. That is the American Railway Engineering Association, of which I am a member. It is primarily a freight yard and laid out on that construction.
Q. Were those plans and specifications that you followed, were those approved by the American Railway Engineers' Association?
A. Yes, that was the standard practice and specification that we followed in the design and construction of that yard.
Q. Is that Association, the A.R.E.A., is that local?
A. No, sir, it is national.
Q. Of what is it composed?
A. It is composed of railroad engineers over the United States, mostly in a supervisory capacity. To be a member of the A.R.E.A. you must meet certain qualifications by having so many years experience in this certain field, not followed by other engineers.
Q. These specifications used in the construction of that yard, was that the best thinking of engineers developed in the construction of railroad facilities?
A. That is true. The specifications and general plan are an accumulation of committee reports. We have committee reports on various phases of railroad construction, and they are compiled in the committee reports that are available to all members." (St. F. pp. 301-2)

"The Ballast used in the yards was pit run gravel. The specifications were that it must pass a 2 inch screen. It would eliminate rocks that would not pass a 2 inch screen. The first six inches of gravel was spread by draglines, and bull dozers over the entire area. (S.F. p. 303). The tracks were built on this six inches of gravel. Additional gravel was then unloaded from hopper bot-

tom cars, making 12 inches of gravel, then it was levelled off between the rails to the top of the ties. (S.F. pp. 303-4) The gravel was tamped immediately in the tracks. There was no tamping between the tracks. The only tamping along the track was by a machine. (S.F. p. 304). At that time that was the best known specifications and plans that we had to follow and we followed them. The gravel as it was put in was levelled off even with the ties. As the gravel picks up soil and dirt it becomes more solid. It is rather loose when it is put in but it acquires soil and dirt. (S.F. p. 304).

"Q. You have walked in the yard at night when the lights were on?

A. Yes, I have walked it many times. Being resident engineer I have been there many times.

Q. Tell us about the gravel after it was first installed.

A. It was pit run gravel and it was hard walking, but I wouldn't say that it was dangerous. It was just like gravel in the fill of any road, and I have walked back and forth quite a number of times through there.

Q. The lights, then, the lighting of the yard and the gravel type of construction of the yard, the method that the gravel was placed in the yard, did all of those thngs meet all of the specifications that you engineers had access to at the time?

A. To the best of our ability and knowledge at that time." (St.F. p. 306)

"In the period from June to December, the gravel would tend to sink and become more solid because as you use it and walk over it, the vibrations of the train would tend to set the gravel up more than when it was put in." (St.F. p. 307) We use gravel out of the same pit that this came from in other yards on the line to Brownsville. (St.F. p. 308)

Reply to Petitioner's Reasons for Granting the Writ

Petitioner's contention under this point that the Texas Supreme Court applied a different concept of negligence than is applied by this Court in this class of cases just is not correct. The Texas Court correctly stated the rule as follows:

> "The proper test to be applied is * * * that in determining liability were the facilities provided or was the place to work such as a person of ordinary prudence would have provided under the same or similar circumstances, having in mind the employer's duty to furnish a safe place to work. See Chicago, Great Western Railway Company v. Smith, 9th Circuit, 228 F. 2d 180. If the employer knows, or in the exercise of ordinary care should know that prevalent conditions are inadequate to protect his employees from injury, then negligence, within the meaning of the Federal Employers' Liability Act attaches. See Urie v. Thompson, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282. These same rules of law were followed by this court in determining the 'no evidence' question involved in the case of Hopson v. Gulf Oil Corporation, 150 Tex. 1, 237 S.W. 2d 352 (a Jones Act case).
>
> "Thus, we have federal decisions and state decisions determining 'no evidence' questions by using the same settled rules of law * * *. In holding that the record is devoid of evidence showing negligence on the part of petitioner in furnishing respondent a safe place to work, we are not unmindful of the rule that petitioner must show that reasonable minded men could not draw different inferences from the evidence. See Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610.
>
> " * * * The Standard to test the question of negligence vel non is the common experience of mankind,

and implies generally the want of that care and diligence which ordinarily prudent men would use to prevent injury under the circumstances of the particular case." (Pps. 44-5-6 of the Petition).

We respectfully ask the court to compare the rules applied by the Texas Court with the following Statement of the rule by this Court in *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 87 L. Ed. 610, 63 S. Ct. 444, 451:

> "In this situation the employer's Liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done. (Baltimore P. R. Co. v. Jones, 95 U. S. 439, 442, 24 L. Ed. 506; Texas P. R. v. Barrett, 166 U.S. 617, 619, 17 S. Ct. 707, 708, 41 L. Ed. 1136; Grand Trunk R. Co. of Canada v. Ives, 144 U.S. 408, 12 S. Ct. 679, 36 L. Ed. 485). * * * Of course, in any case the standard of care must be commensurate to the changes of the business. Hough v. Texas & P. Ry. Co., 100 U.S. 213, 218, 25 L. Ed. 612; Cf. Northern Pac. R. Co. v. Herbert, 116 U.S. 642, 652, 6 S. Ct. 590, 595, 29 L. Ed. 755."

It is clear that the Texas Court is following the rule of "due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation" as laid down by this Court in the Tiller case, supra. Petitioner's contention in view of this is completely untenable.

Petitioner's reliance upon the *Webb* case (*Webb v. Ill. Central R. Co.*, 77 S. Ct. 451, 1 L. Ed. 503) cannot

support his position. In the *Webb* case, the plaintiff had fallen because of striking his foot against a clinker in what was otherwise a smooth walkway. It was conceded that the clinker created a hazardous condition. Certainly those facts are materially different from this case where the Petitioner fell because of the loose gravel. In fact, it is only in his application that Petitioner takes the position that the particular rock he stepped on was the cause of his injury. The Texas Court follows the rules laid down in the *Webb* case. *Hopson v. Gulf Oil Corp.*, 237 S.W. 2d 352, 150 Tex. 1, (a Jones Act case); *Texas & New Orleans Railroad Company v. Hayes*, 293 S.W. 2d 484.

The portions of the opinion of the Texas Supreme Court quoted by Petitioner were in answer to Petitioner's oral argument before that court to the effect that liability under the Act was not predicated on negligence. That argument, of course, is not valid.

The evidence which Petitioner claims is sufficient to raise a fact issue for the jury is wholly insufficient to do so.

Petitioner's insistence that gravel of a larger size than was prescribed by the specifications was used is of no assistance to him. As noted above he failed to preserve any point of error with respect to this point. However even if we assume, for the sake of argument, that Petitioner did preserve this point, there is no merit in the point. The uncontradicted testimony of Respondent's resident engineer was that gravel of 2" or less was used (S.F. p. 303). Samples of the gravel were tested to make sure that it met specifications. (S.F. pp. 308-9). Petitioner's own witness testified that the gravel used was "*just regular railroad gravel.*" (S.F. p. 194). There was no intimation of any

character that gravel of a different size or character was ever used by any other railroad company in covering its yards. The only reasonable inference to be drawn from the testimony of petitioner's witness that this was *"just regular railroad gravel"* is that gravel of this type is universally and customarily used by railroad companies for this purpose.

While it is true that there was some testimony that there was a few pieces of gravel in the large yard which exceeded 2 inches in size, such is not any evidence of negligence as to allow the petitioner a recovery. This is true for the simple reason that the presence of such rocks, if any, did not contribute to petitioner's fall. It is immaterial what rocks may have been present a few feet from petitioner. As will be noted from a reading of petitioner's testimony, he does not attribute his fall to the stepping on a large rock. He described the rock that he stepped on as about two (2") inches in diameter.

Petitioner's argument that the jury could infer that the gravel in other yards was packed is fallacious. The only reasonable inference to be drawn from petitioner's testimony that other yards that he had been in did not have that much loose gravel (S.F. p. 78) and from the testimony of petitioner's witness Chandler that *all* the other yards that he had been in were older yards and the gravel in them had *"packed down more or less"* is that a certain amount of loose gravel is a common character of freight yards. Now, if the yards had been packed and tamped, as petitioner contends, this loose gravel would not be present. It necessarily follows that the Supreme Court of Texas drew the only reasonable inference.

The statement of Respondent's resident engineer that he thought provisions would be made for the engineers to walk to their trains, wholly fails to be a basis for the jury's finding. It was only nine hundred feet from the roundhouse to the place where the engines were spotted. That distance certainly isn't too far for an able bodied man to walk. There is no intimation in the statement that any other or further facility was to be constructed for the use of petitioner.

Petitioner's complaint that other employees had been furnished with better footing is not well taken. It is well established that the standard of care must be commensurate to the danger of the business. Less diligence is required where the danger is slight than where great. *Frizzell v. Wabash R. Co.*, 9 Cir., 199 F. 2d 153. Petitioner's only concern was to walk to his engine. He had no other duties to perform while walking to his engine. He could give his undivided attention to his walking. Surely walking on unpacked gravel is not an unreasonable risk for a person who can give his undivided attention to his walking.

But compare the situation of the car inspectors (such as petitioner's witness Hill) and switchman, who because of their duties could not look where they were walking. It was for the benefit of this class of employees, who are in a materially different situation from petitioner, that the leads, where this class of employees worked, were surfaced. The fact that Respondent provided a better footing for the employees as they worked parallel with the tracks in the yard is not any evidence of negligence with respect to Petitioner. Petitioner was walking perpendicularly to the tracks, not parallel with them.

Likewise, petitioner's argument that a peculiar situation existed at Settegast Yard is without merit. There was not any area surfaced for walking across the tracks. It was a large yard and, of course, it would be necessary for all the different classes of employees to cross the track. The engineers are not entitled to any preferential or better footing than any other class.

It should be remembered that the providing of a path for petitioner to use in walking from the Roundhouse to his train was not merely the simple matter of creating a narrow path in a straight line from the Roundhouse to the engine. Since box cars and trains would be on the intervening tracks and petitioner would have to detour around them, it would be impossible to erect such pathway. To construct a special walkway for Petitioner would necessitate covering the entire yard.

There is no evidence in the record that any complaint had ever been made to respondent regarding the condition of the yard. There is no evidence that anyone in petitioner's situation had ever fallen prior to the occasion in question. Clearly the fall by petitioner's witness who fell because he stepped on a rail and the fall by petitioner's witness who fell because his duties prevented him from looking where he was stepping, are materially different situations and have no relevance as to the point under consideration. The same is true of the testimony of petitioner's witness who had seen others *stumble and fall*. Without testimony that they fell because of the gravel, such testimony is not pertinent. They may have stumbled because of stepping on a rail or by catching their foot in the cuff of their trousers.

A layman has no other alternative than to engage experts to prepare plans and specifications for the erection of the improvement he desires to build. That is exactly the procedure followed by the Respondent in this case. There is no dispute but that the American Railway Engineers Association is competent in this field. It makes studies and compiles reports regarding each phase of construction. The Respondent erected his yard in accordance with the plans and specifications prepared by that group. The law is clear that the judgment of engineers, just as the judgment of architects, is not subject to review by a jury. We quote from the case of *Louisville and N. R. Co. v. Davis* (Ct. App. 6 Cir. 1935), 75 F. 2d 849, 850 as follows:

> "*The rule is well settled that the master is not bound to use the safest and best method of contrivance to meet the legal requirement of reasonable care, and that in any event reasonable engineering and scientific judgment is not subject to review by a jury.* Baltimore & O. R. Co. v. [illegible]eger, 266 U.S. 521, 530, 45 S. Ct. 169, 69 L. Ed. 419; Toledo, St. L. & W. R. Co. v. Allen, 270 U.S. 165, 170, 48 S. Ct. 215, 72 L. Ed. 513; Delaware, L. & W. R. Co. v. Koske, 279 U.S. 7, 11, 49 S. Ct. 202, 73 L. Ed. 578; Richards v. Rough, 53 Mich. 212, 18 N.W. 785." (Emphasis ours)

And the case of *Delaware, L. & W. Ry. Co. v. Koske*, 279 U.S. 7, 73 L. Ed. 578, at p. 581 of 73 L. Ed. as follows:

> "Fault or negligence may not be found from the mere existence of the drain and the happening of the accident. The measure of duty owed by defendant to plaintiff was reasonable or ordinary care having regard to the circumstances. Patton v. Texas & P. R.

Co., 179 U.S. 658, 664, 45 L. Ed. 361, 364, 21 Sup. Ct. Rep. 275. There is no evidence that the open drain was not suitable or appropriate for the purpose for which it was maintained or that there was in use by defendant or other carriers any means for the drainage of railroad yards which involve less of danger to switchmen and others employed therein. Defendant was not bound to maintain its yard in the best or safest condition; it had much freedom in the selection of methods to drain its yard and in the choice of facilities and places for the use of its employees. *Courts will not prescribe standards in respect of such matters, or leave engineering questions, such as are involved in the construction and maintenance of railroad yards and the drainage systems therein, to the uncertain and varying judgment of juries.* Toledo, St. L. & W. R. Co. v. Allen, 276 U.S. 165, 170, 72 L. Ed. 513, 516, 48 Sup. Ct. Rep. 215.

"The evidence is not sufficient to warrant a finding that defendant was guilty of any breach of duty owed to plaintiff in respect (12) of the method employed or the condition of the drain at the time and place in question. Nelson v. Southern R. Co. 246 U.S. 253, 62 L. Ed. 699, Sup. Ct. Rep. 233; Missouri P. R. Co. v. Ashy, 275 U.S. 426, 72 L. Ed. 351, 48 Sup. Ct. Rep. 177." (Emphasis ours)

This Honorable Court may inquire as to the reasoning behind the engineers' decision to not pack the gravel. Certain factors, sufficient to show beyond a doubt that it was a question to be decided in accordance with the best engineering judgment available to Respondent, may be mentioned. Some of the more obvious factors are as follows:

(1) The matter of drainage. The freight yard is a large one and it is common knowledge that Houston, Texas, normally has a very heavy rainfall. The area under the rails

and ties had been packed. It is common knowledge that wate. will not drain through tightly packed substances. Therefore, the rain which fell on the area covered by the ties would have to drain elsewhere. The only other place is the area between the tracks. Thus the area between the tracks would have to serve as a drainage area not only for the rain which fell on this area, but also for the rain which fell on the area covered by the ties. If the area between the tracks had been packed the result would probably be that the Respondent would be charged with negligence in allowing water to stand in the yard—in having a defective drainage system.

(2) It is well known that as trains pass over the roadbed they cause the roadbed to vibrate. It may well be that if the entire area was packed these vibrations would cause the packed gravel to buckle in certain areas. This buckling would result in obstructions which would be dangerous to the employees working in the yards. The buckling would likewise cause the rails to shift and become out of line, creating the definite possibility of derailment of cars and danger to employees and property.

(3) The feasibility and method of packing. The evidence showed, without contradiction, that the first six inches of gravel was spread over the yard by bulldozers. The tracks were built on this six inches of gravel and thereafter an additional six inches of gravel was unloaded from hopper bottom cars, and this was levelled off with the ties. Now, how can the gravel in that narrow strip be packed. The plat of the yard certainly shows that the distance between the tracks is too narrow for a regular street roller to be used. (Plaintiff's exhibit # 2) There was no evidence that there was any type of machine available for this purpose.

Perhaps Petitioner will argue that all the gravel should have been packed before the tracks were laid. Let us assume for the moment that such had been done. What would be the result? The result would, of course, be that the entire tie and rail would be above the level of the gravel. Instead of the gravel being level with the ties, the ties would be protruding, resulting in a hazard to the men working in the yard. This same result would occur if it had been possible to pack the gravel after the tracks were laid. After it was packed the ties would be above it, and then they would constitute a hazard to the employees. It has been judicially determined that a railroad company is negligent in not having the space between the ties filled in. (*G.C.S.F. Ry. Co. v. Rediker* (Sup. Ct. 1886), 2 S.W. 513).

The above matters were no doubt taken into consideration by the engineers who study and design such yards as the one in question. There can be no doubt but that the matter was a decision to be made by the exercise of competent engineering judgment. *The law is clear that such is not subject to review by a jury untrained in such matters.* To hold otherwise is to allow a jury to convict a defendant of negligence upon nothing but conjecture and surmise.

We also ask the court to consider that in this case, just as in the *Koske* case, supra (279 U.S. 7), there is absolutely no evidence that the method of construction used was not suitable or appropriate or that there was in use by this defendant or any other railroad company any different method of construction of freight yards which involved any less hazard to their employees than the methods used in the instant case. There is absolutely no evidence that any other railroad company undertook to

pack the gravel in its freight yard in the area between the trac s.

Was there any reason for Respondent to anticipate injury to an employee who could give his undivided attention to his walking? Has the "Common experience of mankind" been such with reference to unpacked gravel that it gives rise to an anticipation of injury to one who walks over it? We submit that it has not been such. It is common knowledge, of which this Court can take judicial knowledge, that in the rural areas of this Country many of the public roads are gravelled. Even in the cities of this country some of the streets are gravelled. Are those roads and streets dangerous to walk upon when the gravel has not been packed or rolled? But we are not without direct evidence on this matter. We may take the experience of the employees who walked in this freight yard. Here the yard had been open approximately six months. The Petitioner himself is the only person, so far as this record shows, who had claimed that he had fallen due to gravel not being packed. (The testimony regarding a fall by stepping on a rail or by stumbling and falling are not pertinent since they involve different factual situations. The testimony of the witness Hill that he had fallen while inspecting cars is not pertinent since the Respondent would be under a duty to exercise greater care for him because the danger would be greater if one can't look where he is stepping.) It is not the anticipation that one of many will slip and fall that gives rise to an anticipation of injury. The common experience of mankind teaches us that occasionally one among many will slip and fall at a given spot regardless of the footing. (That undoubtedly is the reason why the mere happening of an accident is not any evidence of negligence. As stated by the San Antonio Court of Civil

Appeals in the case of *Camp v. J. H. Kirkpatrick Co.*, 250 S.W. 2d 413 (Writ Ref. NRE, 1950), at p. 419 ". . . the mere fact of falling does not prove the presence of danger any more than it proves clumsiness.") Rather it is the knowledge that arises where several people slip and fall at a particular spot that gives rise to an anticipation of injury. Where several have fallen the common experience of mankind teaches us that there must be some reason. While it is not unusual that one out of many may fall at a given spot it is unusual that several will fall at a given spot.

Certainly the fact that only the Petitioner of the many, many working and walking in the yard, had fallen is strong and persuasive evidence that the yard was reasonably safe for the use which Petitioner was making of it; to-wit, walking to his train.

Conclusion

The proofs in the instant case wholly fail to justify with reason the jury's conclusion that the Respondent was negligent. The Supreme Court of Texas drew the only reasonable inference possible from the evidence adduced. There is no evidence in the record from which a jury could reasonably infer that Respondent was negligent.

WHEREFORE, Premises considered, Respondent prays that the petition for a Writ of Certiorari be denied.

Respectfully submitted,

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